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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/696,764	10/29/2003	Jairajh Mattai	IR #7228-00	6662

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EXAMINER

COTTON, ABIGAIL MANDA

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 11/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/696,764

Applicant(s)

MATTAI ET AL.

Examiner

Abigail M. Cotton

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 5/9/05, 4/5/04, 3/26/04 and 10/29/03.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>5/9/05, 4/5/04</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claims 1-17 are pending in the application.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-17 are rejected under 35 U.S.C. 112, second paragraph, for reciting the phrase "polyacrylate superabsorbent polymer (sodium salt) with a salt or ionic strength tolerance under a Baseline Absorption Test sufficient to give at least 25 weight % water absorption," as recited in claim 1. The phrase renders the claim indefinite because it is not clear what polyacrylate superabsorbent polymers are intended and/or encompassed by this phrase, and thus the scope of the claim is unclear. On page 14 of the Specification, Applicant describes the Baseline Absorption test as a measure of the amount of water absorbed by a salt-containing composition having the polyacrylate superabsorbent polymer relative to a salt-containing composition without the polyacrylate superabsorbent polymer. However, it is noted that the Baseline Absorption Test results will be dependent on the characteristics of the salt-containing composition used. That is, the percent water absorption of the solution with the polymer will be dependent upon the type of salt and salt concentration, and will also likely be dependent upon such factors as the pH, temperature, etc.

The specification fails to provide adequate guidance as to what salt-containing compositions are intended to be used and/or are encompassed by this test, and instead provides Baseline Absorption Test results for only a few examples of specific salt-containing stick compositions (see Tables A, B and C.) Thus, It is not clear whether a polyacrylate superabsorbent polymer satisfies the criteria of claim 1 if it shows at least 25% by weight water absorption in one of these specifically disclosed salt-containing compositions, or if a polyacrylate superabsorbent polymer having at least 25% by weight water absorption in another salt-containing composition other than those specifically described would also fall within the scope of the claim. Thus one of ordinary skill in the art would not be able to adequately determine if a polyacrylate superabsorbent polymer meets the Baseline Absorption Test criteria as claimed, because one of ordinary skill in the art would not know in which salt-containing compositions the polymer should exhibit the 25% by weight water absorption in order to meet the Baseline Absorption Test criteria as claimed. Claims 2-17 are rejected under 35 U.S.C. 112, second paragraph, as being dependent upon a rejected claim. Appropriate correction and/or clarification are required.

In the interests of compact prosecution and for the purposes of applying prior art, the polyacrylate superabsorbent polymer recited in claim 1 is being interpreted as any polyacrylate superabsorbent polymer that exhibits some tolerance in a salt-containing

composition, i.e. a polyacrylate superabsorbent polymer that can be suitably provided in a salt-containing composition.

Claims 1 and 17 are furthermore rejected under 35 U.S.C. 112, second paragraph, as being indefinite for reciting a narrower range within a broad range within the same claim. In particular, the presence of terms and/or phrase in parenthesis, such as “sodium salt” and “on an active basis” in claim 1, and “as a cycloalkylene linkage” as recited in claim 17, represent narrower ranges or subsets within the broader range of the remaining non-parenthetical claim. A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by “such as” and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 1 recites the broad recitation “polyacrylate superabsorbent polymer”, and the claim also recites the parenthetical statement “sodium salt,” which is the

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narrower statement of the range/limitation. Similarly, claim 1 recites the broad recitation "0.1-10 weight % silicone elastomer", and the claim also recites the parenthetical statement "on an active basis," which is the narrower statement of the range/limitation. Claim 17 recites the broad recitation "C5 or C6 cycloalkane", and the claim also recites the parenthetical statement "as a cycloalkylene linkage," which is the narrower statement of the range/limitation. Appropriate correction is required.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-17 are rejected under 35 U.S.C. 103(a) as being obvious over U.S. Patent No. 6,436,382 to Chopra et al, issued August 20, 2002, in view of U.S. Patent No. 5,605,681 to Trandai et al, issued February 25, 1997.

Chopra et al. teaches a suspension cosmetic product for reducing wetness under the arm which is a stick or a soft solid (see abstract, in particular.) Chopra et al. teaches that the composition comprises from 10-88% by weight of a volatile silicone having a flash point of 100 degrees or less, a gelling agent that can comprise from 5-30

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weight percent of stearyl alcohol, 0-5% by weight of a surfactant having a hydrophilic/lipophilic balance in the range of 3-13, 0-10% by weight of an antiperspirant active, 0-20 weight percent of a nonvolatile silicone having a flash point greater than 100 degrees C, and 0-20% by weight of an emollient, where the amount of water in the composition is only up to 2% (see abstract and column 2, lines 4-45, in particular.) Thus, Chopra et al. teaches a stick or soft solid composition having components that meet the limitations of parts (b) through (g), and the water content of less than or equal to 2% by weight proviso, as recited in claim 1.

Chopra et al. furthermore teaches that it is desirable to provide a superabsorbent polymer in the composition that is capable of absorbing water to provide an extra measure of protection against wetness (see column 1, lines 10-60, in particular.) Chopra et al teaches that a percent by weight of a superabsorbent polymer provided in the composition can comprise from 0.01-20 weight percent, which meets the range limitation recited in part (a) of claim 1

Chopra et al. does not specifically teach a stick or soft solid suspension product comprising the polyacrylate superabsorbent polymer, or a sodium salt of a polyacrylate superabsorbent polymer, as recited in claim 1.

Trandai et al. teaches a deodorant gel composition comprising a polymeric gelling agent (see abstract, in particular.) Trandai et al. teaches that the polymeric

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agent is highly absorbent of water, that is capable of absorbing at least 40g of water per gram of gelling agent (see column 6, lines 40-52, in particular), and thus is a superabsorbent polymer. Trandai et al. furthermore teaches that the polymeric gelling material can comprise a polymer formed from monomers such as acrylic acid and sodium acrylate (see column 8, lines 62-67, in particular), and thus teaches providing a superabsorbent polyacrylate and/or polyacrylate sodium salt, as recited in the claim. Trandai et al. also teaches that the deodorant composition can comprise a deodorant active that is a salt (see column 3, lines 1-35, in particular), and exemplifies compositions with the polymeric gelling agent and salts such as sodium stearate and tetrasodium EDTA (see column 16, lines 40-68, in particular.) Thus, Trandai et al. teaches providing a polymeric gelling agent that is suitable for salt-containing deodorant compositions, and thus teaches polymeric gelling agents with ionic strength tolerance, as recited in claim 1.

Accordingly, one of ordinary skill in the art at the time the invention was made would have found it obvious to provide the superabsorbing polyacrylate polymer with ionic strength tolerance of Trandai et al. in the underarm product of Chopra et al, because Chopra et al. teaches that the product desirably comprises a superabsorbing polymer to reduce underarm wetness, and Trandai et al. teaches a superabsorbent polymer that is suitable for deodorant products. Thus, one of ordinary skill in the art would have been motivated to provide the superabsorbent polymer of Trandai et al. in the underarm product of Chopra et al, with the expectation of providing an underarm

product having a cosmetically-acceptable superabsorbent polymer that reduces underarm wetness. Accordingly, claim 1 is obvious over the teachings of Chopra et al. and Trandai et al.

Regarding claims 2-3, Chopra et al. teaches that the superabsorbent polymer can comprise from 0.5-5% by weight of the composition (see column 1, lines 60-68, in particular), which meets the range limitations recited in the claims. Furthermore, it is considered that one of ordinary skill in the art at the time the invention was made would have found it obvious to vary and/or optimize the amount of the superabsorbent polymer provided in the composition, according to the guidance provided by Chopra et al, to provide an underarm product having desired properties. It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955.)

Regarding claim 4, Chopra et al. teaches that the volatile silicone can be a D4-D6 cyclomethicone (see column 2, lines 1-10, in particular.) Regarding claim 5, Chopra et al. teaches that the volatile silicone can comprise a combination of D5 and D6 cyclomethicones (see column 2, lines 4-10, in particular.) Regarding claim 6, Chopra et al. teaches that Japan wax of hydrogenated castor oil can be provided (see column 2, lines 10-15, in particular.) Regarding claim 7, Chopra et al. teaches that the composition can comprise a surfactant comprising from 0.05-50% by weight of a

silicone copolyol at a concentration of 10% in cyclomethicone (see column 7, lines 45-60, in particular), and thus teaches the range limitations recited in the claim.

Regarding claim 8, Chopra et al. teaches the composition can comprise from 5-10% of an antiperspirant active (see column 2, lines 25-30, in particular), which meets the range limitation recited in the claim. Regarding claim 9, Chopra et al. teaches that 5-10% by weight of a nonvolatile silicone can be provided in the composition (see column 2, lines 30-32, in particular), which meets the range limitation recited in the claim. Regarding claims 10-11, Chopra et al. teaches that the composition can comprise from 2-12% by weight of an emollient that can be a C12-15alkyl benzoate, among others (see column 2, lines 32-38, in particular), which meets the range and composition limitations recited in the claim.

Regarding claim 12, Chopra et al. teaches that deodorant active materials such as antimicrobial agents, including triclosan, can be provided (see column 3, lines 25-50), and thus teaches providing deodorizing agents that are not antiperspirant actives, as recited in the claim. Regarding claim 13, Chopra et al. teaches that the composition can comprise from 5-30% by weight of stearyl alcohol as a gelling agent (see column 2, lines 10-11, in particular), and thus teaches the range limitation recited in the claim. Regarding claim 14, Chopra et al. teaches that the composition can comprise 0.1-20% by weight of Japan wax (see column 2, lines 10-15, in particular), which meets the limitations recited in the claim. Regarding claim 15, Chopra et al. teaches that the

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composition can comprise a gelling agent that is a silicone elastomer (see column 2, lines 10-20, in particular.) Regarding claim 16, Chopra et al. teaches that the gelling agent can comprise a low molecular weight polyethylene having a molecular weight in the range of 400-1000 (see column 2, lines 10-20, in particular.) Regarding claim 17, Chopra et al. teaches that the composition can comprise a gelling agent that is a siliconized polyamide having the same formula as that recited in the claim (see column 4, line 48 through column 5, line 55, in particular.)

Accordingly, claim 1-17 are not patentable over the teachings of Chopra et al. in view of Trandai et al.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-17 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2-18 of copending Application No. 10/964,268 as published in U.S. Patent Application Publication No. 2005/0118125 to Mattai et al. on June 2, 2005. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant claims and conflicting claims recite the same stick or soft solid composition having the same percent by weight of each component. While the conflicting claims of the published application recite the further limitation of a ratio of superabsorber to active salt that is in the range of 0.13-4:1, as in claim 2 the open "comprising" language of the instant claims allows for other ingredients and ratios between ingredients, and thus the instant claims are obvious over the claims of the 2005/0118125 published application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

No claims are allowed.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. In particular, U.S. Patent No. 5,997,850 to Tang et al, published October 6, 2004, teaches antiperspirant actives comprising stabilized solutions with glycine (see abstract, in particular), and U.S. Patent Application Publication No. 2003/0162869 to Romans-Hess et al. published August 28, 2003, teaches ionic superabsorbent polymers that having increased swelling capacity in salt-containing solutions by the addition of an additive such as glycine (see abstract and paragraph 0025, in particular.)

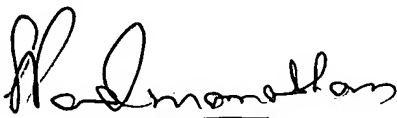
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Abigail M. Cotton whose telephone number is (571) 272-8779. The examiner can normally be reached on 8:30-5:00, M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

AMC


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SUPERVISORY PATENT EXAMINER